

TELEPHONE SOLICITATION

Introduction

The Idaho Real Estate Commission is often asked whether or not an unlicensed person can perform telemarketing services on behalf of a licensee. Most often, licensees want to employ the services of unlicensed assistants or telemarketing firms, from in or out of state, to make unsolicited telephone calls to the residential phones of persons whose listings have expired recently, persons who live in a neighborhood where homes are selling well, or persons who currently have their houses offered for sale by owner (FSBO's). In addition, licensees often conduct their own "cold calls" to such individuals, whereby they attempt to sell their listing services or obtain appointments to make a listing presentation. The same types of solicitation can occur with potential buyers.

Issues

According to the law(s):

1. Unlicensed persons: Can a person, without first obtaining an Idaho real estate license, make telephone solicitations to secure listings or appointments to make listing presentations on behalf of a licensee?
2. Licensees: Are licensees who make the type of calls described above, on their own behalf, or on behalf of their brokerage, affected by the *Idaho Real Estate License Law and Rules*, the *Idaho Telephone Solicitation Act*, or the federal *Telephone Consumer Protection Act (TCPA)*? If so, how?

Discussion

A person in Idaho may not engage in the business of real estate without first obtaining a license (Section 54-2002, Idaho Code). Section 54-2004(31), Idaho Code, defines a real estate broker:

54-2004. Definitions.

(31) "Real estate broker" means and includes:

(a) Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others.

(b) Any actively licensed broker while, directly or indirectly, acting on the broker's own behalf;

(c) Any person who represents to the public that the person is engaged in any of the above activities;

- (d) Any person who directly or indirectly engages in, directs, or takes any part in the procuring of prospects, or in the negotiating or closing of any transaction which does or is calculated to result in any of the acts above set forth;
- (e) a dealer in options as defined in this section.

It is the opinion of the Idaho Real Estate Commission that any person who, by telephone solicitations, attempts to secure listings or attempts to secure appointments for listing presentations to any individual, must first be licensed as a real estate broker or sales associate within the state of Idaho.

While the *Idaho Real Estate License Law and Rules* do not specifically address telephone solicitation of listings, general rules regarding listings, including agency disclosure, fairness, prohibition of misrepresentation, etc. would apply.

A licensee may engage in telemarketing. However, the licensee should be familiar with the state and federal laws applicable to such marketing activities.

The Idaho Telephone Solicitation Act.

Enacted in 1992, the *Idaho Telephone Solicitation Act* (Title 48, Chapter 10, Idaho Code) regulates telephone solicitation in Idaho, including solicitation by fax.

No Contact List. As of July 2000, the Act allows telephone subscribers to be placed on a “no solicitation contact list” maintained by the Attorney General, and then prohibits any “telephone solicitor” to make or cause to be made any “telephone solicitation” to any person on the list. (Section 48-1004A, Idaho Code.) However, the statute’s “no-contact list” prohibition applies only to calls made “for the purpose of asking, inducing, inviting, requesting, or encouraging the purchaser to purchase or invest in goods or services during the course of a telephone call.” See section 48-1002(10)(a). Thus, it appears that a licensee is not prohibited from contacting persons on the no-contact list, so long as the licensee is not attempting to secure the listing or other agreement for services “during the course of the call.” (e.g., the call does not constitute a “telephone solicitation” if the purpose of the call is simply to gather information about the potential listing, inform the consumer of the licensee’s services, or make appointments to make a listing presentation.)

Unlawful Acts. Although the licensee may be able to contact persons on the no-contact list, the licensee may be subject to the Act’s “unlawful acts” prohibitions of section 48-1003, Idaho Code. Prohibited acts include: intimidation; refusal to hang up immediately upon request; misrepresentation of or failure to disclose material facts concerning the services being offered; and sending any unsolicited advertisement by fax. These restrictions apply to any telephone communication in which:

- (i) a free gift, award, or prize is offered, or in which it is represented or implied that goods or services are offered below the regular price of the goods or services; and
- (ii) a return telephone call is invited or the communication is followed up by a call to the purchaser by the telephone solicitor; and

- (iii) it is intended during the course of the return or follow-up call with the purchaser that an agreement to purchase, or a purchase be made.

See sections 48-1002(10)(b) and 48-1003, Idaho Code.

Registration with the Attorney General. The Act also requires that telephone solicitors register with the Attorney General and provide certain notice of rights of cancellation. However, licensees are expressly exempted from these requirements. See Sections 48-1004 and 48-1005, Idaho Code.

The Federal Telephone Consumer Protection Act.

The federal *Telephone Consumer Protection Act* of 1991, (“TCPA”), 47 U.S.C. ‘ 227, and the regulations promulgated by the Federal Communications Commission (FCC) govern telephone solicitations and regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. These laws apply to ALL solicitors; there are no exemptions for real estate licensees. So brokers and sales associates contacting prospects must be familiar with the federal TCPA and its implementation by the Federal Communications Commission (FCC). These requirements for telephone solicitors include:

- a. No calls to any person whose telephone number is on the National Do Not Call Registry maintained by the FCC; no calling within a given area code without first accessing the Registry for the given area code and paying the appropriate fee for such access. (The annual fee is \$25 per area code, however, there is no charge for the first five (5) area codes accessed).
- b. No calls to residences before 8:00 a.m. or after 9:00 p.m.;
- c. No unsolicited advertisement can be made to facsimile machines without prior express consent of the recipient. The TCPA also prohibits the use or initiation of artificial or prerecorded voice calls in nearly all circumstances to any residential prospect;
- d. Provide the name of the individual caller, the name of the company on whose behalf the call is being made, and the phone number or address at which the caller or company can be contacted;
- e. Honor the requests of consumers who ask not to be called again by keeping, for ten (10) years, a written “do-not-call” list;
- f. Create and maintain a written company policy, available on demand, for maintenance of a “do-not-call” list; if leaving a message, provide a phone number that the consumer can call to be placed on your company-specific do-not-call list.

- g. Train and inform personnel (both employees who might handle any record-keeping, and sales associates) about the federal TCPA, the company policy and the “do-not-call” list.
- h. Must transmit caller ID information; may not block your phone number.

Conclusion

1. An unlicensed person cannot engage in telephone solicitations of any kind designed to procure buyers, listings, or appointments for listing presentations. Such activities require licensure.

2. Yes, the *Idaho Telephone Solicitation Act* and the federal *Telephone Consumer Protection Act* (TCPA) both impact any telephone solicitations (cold calls) made by licensees to prospective buyers and sellers. These statutes and regulations generally do not affect communications with any persons with whom the licensee has prior permission to call or with whom he or she has an established business relationship. Licensees are more likely to be impacted by the TCPA in their day-to-day business activities. Due to the potential for private lawsuits and penalties for failure to comply with either law, licensees are encouraged to consult their attorneys and obtain further information prior to engaging in telemarketing.

Further information concerning the TCPA (15 U.S.C. 6101– 6108) and the Rules of the FCC (16 CFR 310) may be found through the FCC web site:

<http://www.fcc.gov/cgb>

or by requesting copies from the FCC at:
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